SUPREME COURT U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM

No. 1051

CLIFTON FORREST, *Petitioner*

vs.

COMMONWEALTH OF VIRGINIA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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vs.

COMMONWEALTH OF VIRGINIA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

The Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of Virginia, entered in the above case on October 16, 1968.

OPINIONS BELOW

The opinion of the Hustings Court of the City of Portsmouth is not reported.

The opinion of the Supreme Court of Appeals of Virginia is not reported.

JURISDICTION

The judgment of the Supreme Court of Appeals was made and entered on October 16, 1968, and a copy is appended to this petition in the Appendix at p. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

The questions presented by this petition concern not merely the proceedings before the trial court, but the professional ethics of an attorney as well. These questions are:

1. Did the trial court, in effect, deny the petitioner the due process of law by requiring him to elect between presenting the testimony of a material witness in his behalf and having the assistance of counsel for his defense?

2. Did the trial court deny the petitioner the due process of law by refusing to grant him an opportunity to obtain counsel other than his original trial counsel, who was accused at the outset of the proceedings of participating in an attempt to obtain perjured testimony for the purpose of obtaining a dismissal of the indictment?

CONSTITUTIONAL PROVISIONS INVOLVED

That part of the Sixth Amendment to the Constitution of the United States of America, which provides:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

That part of Section 1 of the Fourteenth Amendment of the Constitution of the United States of America, which provides:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

STATEMENT

This petition involves the prosecution and resulting conviction upon an indictment charging the petitioner with violating the provisions of § 18.1-65 of the Code of Virginia, 1950, as amended. The offense was alleged to have been committed on September 17, 1967, and a jury trial commenced on October 10, 1967, and concluded the following day when the jury returned a verdict finding the petitioner guilty of assault and battery.

The alleged victim, H. Farrar, hereinafter referred to as Farrar, was the only material witness for the Commonwealth and according to his testimony, he met petitioner at the Police Headquarters in the City of Portsmouth and there discussed a $365.00 alleged indebtedness and was subsequently driven home by the defendant (Tr. p. 14). Around 7 P.M., the petitioner called at Farrar's home and drove him to the George Washington Tavern, a place of business owned by the petitioner in the City of Portsmouth, Virginia. The tavern was closed, as it was a Sunday. Farrar claims that he sat with Forrest and drank a beer while Forrest drank whiskey and they discussed the repayment of the loan the petitioner allegedly made to Farrar to purchase narcotics. Farrar claims that he offered to pay around the first of the month but this did not satisfy the petitioner (Tr.

pp. 17 and 18). The petitioner then went to the telephone, made a call and came back (Tr. p. 18). About ten minutes later Farrar saw two people outside the tavern and told the petitioner not to let them in because they had masks on. The petitioner opened the door, the two people rushed in, pushed the petitioner aside and then proceeded to beat up Farrar, hitting him in the face with a pistol and subsequently beating him with cue sticks from a pool table, which he indicated that the petitioner gave the two men. Subsequent to the beating, the petitioner drove the complaining witness, Farrar, home and pushed him out of the vehicle.

The petitioner denied having any connection with the beating and indicated that he had received a call from someone who claimed to have seen him with Farrar (Tr. p. 208). That Farrar owed the party on the phone a large sum of money, and that the unknown caller instructed Forrest under pain of injury to himself and his family, to have Farrar at his tavern to discuss the indebtedness; that subsequently two men came into his premises and struck both Farrar and the petitioner. The petitioner denied handing the cue sticks to the two men, having any connection with the two men or knowing who they were. After the incident, he offered to take Farrar to the hospital, but Farrar refused to go and requested that he be taken home. Subsequent to the day of the incident and prior to the trial, Farrar voluntarily came to the office of petitioner's attorney and there made a statement under oath before a Court Reporter denying most of what he had said in the lower Court and indicating that he knew who was in fact behind the beating and that the petitioner had no connection whatsoever with it. At the trial of this cause, on the 10th day of October, 1967,

the complainant, Farrar, took the stand to testify against the petitioner. In the course of doing so, the question of his statement under oath came out and then, for the first time, he indicated to the Court that he had made the statement under threat of fear of bodily harm and that the answers which he gave were in fact concocted by petitioner's lawyer who flashed to him, during the course of his testimony, written answers on a piece of paper, behind the view of the Court Reporter; that the petitioner's attorney nodded his head to indicate the nature of the answer that he desired. He further indicated that the petitioner's lawyer prompted him to make the statements, which were not true at the time he made them under oath.

Upon conclusion of direct testimony and before cross examination, defense counsel (Tr. p. 44 et seq.) moved the Court for leave to withdraw in order to take the stand as a witness and for a continuance to secure additional counsel for the petitioner. The Court overruled petitioner's request, to which action the petitioner excepted. Upon conclusion of the Commonwealth's evidence, the petitioner moved to strike. After hearing argument on the motion, the Court overruled the petitioner's motion, to which action the petitioner excepted. On the date of argument on motions to set aside the verdict, December 15, 1967, the witness, Farrar, without subpoena or previous indication, appeared in Court and advised the Judge of his desire to make a statement. Thereupon, after being first sworn, Farrar took the stand and repudiated his previous statements made at time of trial and, in effect, reiterated the statements made before the Court Reporter on the 27th day of September, 1967. Whereupon motions were made for a new trial on the

grounds of after discovered evidence, or, in the alternative, a judgment off acquittal notwithstanding verdict. After argument thereon the motions were all overruled, to which action the petitioner excepted. Thereupon on the 29th day of February, 1968, the Court entered judgment on the verdict and on October 16, 1968, the petition for appeal was denied by the Supreme Court of Appeals of Virginia.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case because the trial court, by refusing to grant the petitioner an opportunity to replace Calvin W. Breit with other counsel, effectively denied the petitioner his right to present testimony of a witness which would have been relevant and material to his defense, and also effectively denied the petitioner his right to have the effective assistance of counsel for his defense.

1. It is basic that an attorney cannot take the stand to testify in behalf off the party he represents. Canon 19 of the Canons of Professional Ethics, 205 Va. 1012, 1017, provides:

> "When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody off an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in Court in behalf of his client."

The case of *Fish* v. *Commonwealth*, 208 Va. 761, presented a situation wherein it became necessary for an

attorney in a criminal proceeding to take the stand as a witness for his client. Prior to his taking the stand, the trial court had stated that the attorney would be permitted to return to argue the case. However, after the attorney testified, the trial court realized its error and required other counsel, not familiar with the case, to present the closing argument. The issue on appeal was whether the accused had been deprived of his right to counsel, and the answer was in the affirmative. Mr. Justice Carrico wrote in *Fish* v. *Commonwealth,* supra, 764:

> "Although Canon 19 frowns upon the practice of counsel becoming a witness in behalf of his client, it sometimes happens during the course of trial that the exigencies of the situation require such action—where, in the words of the canon, it is 'essential to the ends of justice.' We do not inquire into the question of whether such a situation existed in this case. Mr. Lindauer obviously thought it did exist, and the trial court manifestly agreed with him because the court ruled that it was 'proper' for Mr. Lindauer to testify in behalf of the defendant.
>
> "While the operation of Canon 19 may be the reason that no case authority has been found, the canon itself does supply, at least in part, the answer to the problem presented in this case. The canon requires that when it becomes necessary for counsel to take the witness stand in behalf of his client, he shall withdraw and 'leave the trial of the case to other counsel.'
>
> "Since there is the requirement upon counsel to request permission to withdraw and upon

withdrawal to 'leave the trial of the case to other counsel,' *there surely must be a reciprocal duty upon the court trying the case to permit such withdrawal, if it believes the request to be in good faith, and to afford the client reasonable opportunity to secure 'other counsel.'*"
(Emphasis added.)

It is apparent that the trial court agreed with petitioner's trial counsel that his testimony was essential to the petitioner's defense and, therefore, to the ends of justice, since the trial court ruled that it would be proper for Mr. Breit to testify on behalf of his client. However, Mr. Breit recognized the conditions that would have been imposed upon him after testifying for the petitioner, and he declined to take the stand unless the petitioner was granted an opportunity to obtain other counsel. This the trial court refused to permit. Had Mr. Breit accepted the offer of the trial court and attempted to return to the counsel table after testifying for his client, the situation would have been the same as that presented in *Fish* v. *Commonwealth,* supra, and it is interesting to note that the trial court in *Fish* v. *Commonwealth,* supra, was also the Hustings Court for the City of Portsmouth, Virginia, although a different judge was presiding.

The fact that Arthur C. Ermlich, a partner with Mr. Breit's law firm, was assisting him at the counsel table is immaterial. Mr. Ermlich was not prepared to accept the petitioner's defense. Furthermore, the admonitory language of Canon 19 was applicable to the attorney who testified as well as his partners, according to Opinion No. 47 of the Standing Committee on Legal

Ethics of the Virginia State Bar, which was announced on the date of October 26, 1953, the pertinent part of which provides: (The entire Subject, Inquiry, and Opinion of Opinion No. 47 is contained in Appendix B, p. 2a.)

> "Canon 19 provides that 'when a lawyer is a witness for his client, except as to merely formal matters such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel.' If a lawyer, after accepting employment, finds that he must be an essential or material witness, then it would be improper for him to continue as counsel in the case and he should withdraw. The relationship of partners in a law firm is so close that anything which requires a lawyer to refuse employment or withdraw from a case generally, but not always, requires his partners to do likewise . . . ."

The trial court, in effect, required the petitioner to elect between having Mr. Breit assist in his defense or testify on his behalf, and since the petitioner desired Mr. Breit's assistance as counsel, the necessary result of the trial court's ruling was that the petitioner was denied his right to put on the stand a witness who could give testimony that would have been relevant and material to his defense. This ruling of the trial court is in conflict with the decision of this Court in *Washington v. State of Texas,* 388 U.S. 14, 87 S. Ct. 1920, 1923, where Mr. Chief Justice Warren wrote:

> ". . . The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version

> of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law."

Mr. Chief Justice Warren concluded in *Washington* v. *State of Texas,* supra, 1925:

> "We hold that the petitioner in this case was denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense. The Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use. . . ."

The holding in *Washington* v. *State of Texas,* supra, was inescapable in view of the provisions of the Sixth Amendment of the Constitution of the United States of America and the due process clause of the Fourteenth Amendment. For the same reasons, the conclusion in the instant situation must be that the petitioner was denied the due process of law when he was denied the right to obtain other counsel for the purpose of obtaining the testimony of Mr. Breit.

2. It is difficult to conceive of a manner in which the effectiveness of petitioner's counsel could have been more effectively eliminated than by preventing him from answering a charge that he participated in a felony, an attempt to suborn perjury, unless he should actually admit the truth of the charge, which was substantially the situation presented in *Bovey* v. *Grandsinger,* 253 F. 2d 917, 922, where it was stated:

> "It is difficult to imagine how the effectiveness of a defendant's counsel could be more completely destroyed than by causing him to confess before the jury, at the close of the evidence at the trial, that he had been guilty of gross misconduct in having tampered with the State's evidence . . . ."

Petitioner was forced to elect between being represented by counsel who could not take the stand and deny the accusation that he had participated in a felony and permitting his counsel to take the stand in rebuttal at the expense of continuing his defense without the assistance of counsel.

Consider also the fact that the "surprise testimony" of Farrar, which prejudiced the rights of the petitioner, was known and expected by the Commonwealth. However, the Commonwealth's attorney did not feel it necessary to disclose to the petitioner that Farrar would not only disavow his statement of September 27, 1967, but that he would also accuse the petitioner and his trial counsel of felonious conduct. Mr. Piersall stated:

> "I certainly am not aware of any law that says that the Commonwealth's Attorney is supposed to call up the attorney for the defense every time he finds some evidence in a case." (Tr. 48)

Evidently the Commonwealth's attorney had forgotten about Canon 5 of the Canons of Professional Ethics, 205 Va. 1013, which provides:

> "The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible."

Although Farrar disavowed, before the jury, his statement of the evening of September 27, 1967, his testimony on December 15, 1967, was consistent with that statement, while being in conflict with that presented before the trial court on October 10, 1967. Therefore, it seems that Mr. Breit should have been accused of obtaining the truth from Farrar. However, the trial court effectively prevented Mr. Breit from testifying in defense of Farrar's accusations and the refusal of the trial court to grant petitioner an opportunity to obtain other counsel constituted a denial of the petitioner's fundamental constitutional right to the effective assistance of counsel. *Powell* vs. *Alabama,* 87 U. S. 45., 53 S. Ct. 55.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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APPENDIX

APPENDIX A

IN THE SUPREME COURT OF APPEALS HELD AT THE SUPREME COURT OF APPEALS BUILDING IN THE CITY OF RICHMOND ON WEDNESDAY, THE 16th DAY of OCTOBER, 1968.

The petition of Clifton Forrest for a writ of error and supersedeas to a judgment rendered by the Court of Hustings for the City of Portsmouth on the 29th day of February, 1968, in a prosecution by the Commonwealth against the said petitioner for a felony, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said hustings court.

A Copy,

Teste:

/s/H. G. Turner
Clerk

APPENDIX B

OPINION No. 47
October 26, 1953

Subject:

Attorney appearing as witness in case in which he is serving as counsel.

Inquiry:

The law firm of A & B was retained by the father of an infant to represent the infant's claim for personal injuries arising out of an automobile that thereafter, during his negotiations with the defendant's insurance ad- accident and suit was instituted. Partner A handled all details and claims juster, a sum was offered in settlement.* The offer was oral and was to be submitted by Partner A to his client. Several days later, with client's approval, Partner A wrote the adjuster a letter accepting the offer. Subsequently, the adjuster and his company denied that the offer had been made and refused to make settlement. A & B now desire to abandon the court action and bring suit on the contract. Partner A would have to testify and would be essential and material witness. Partner B would not be a witness.

The firm desires to know to what extent either partner could participate as counsel and to what extent either or both partners could share in the fee either if the matter is handled by the partners or if it is referred to other counsel.

**injuries arising out of an automobile that thereafter, during his negotiations with the defendant's ~~insurance~~ ad- accident and suit was instituted. Partner A handled all details and claims juster, a sum was offered in settlement.*

This is as it appeared in the original.

Opinion:

Canon 19 provides that "when a lawyer is a witness for his client, except as to merely formal matters such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel." If a lawyer, after accepting employment, finds that he must be an essential or material witness, then it would be improper for him to continue as counsel in the case and he should withdraw. The relationship of partners in a law firm is so close that anything which requires a lawyer to refuse employment or withdraw from a case generally, but not always, requires his partners to do likewise. While the suit on the contract is an outgrowth of the original matter in which the firm was employed, yet it is a new case entirely different from the suit originally brought and the basis of the suit is the alleged offer by the insurance adjuster to Partner A and it appears that the suit must stand or fall upon the evidence of Partner A.

If suit is going to be instituted on the contract and Partner A is going to be a material witness, then your Committee is of the opinion that neither partner should act as counsel in the case, but the firm is entitled to compensation for work done up to the time of the development of the situation which required Partner A to be a witness.

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CLIFTON FORREST,
Petitioner

vs.

COMMONWEALTH OF VIRGINIA,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

AT WASHINGTON

No. 1051

CLIFTON FORREST,
Appellant

vs.

COMMONWEALTH OF VIRGINIA,
Appellee

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

1. Did the trial court deny the petitioner the due process of law by refusing to allow counsel for his defense to withdraw as his counsel and to participate as a witness for the defense after the commencement of the trial?

STATEMENT OF CASE

On October 10 and 11, 1967, the defendant was tried under indictment for violation of Section 18.1-65 of the

Code of Virginia, 1950, as amended. The defendant was duly tried and found guilty of assault and battery by a jury, the Honorable Judge Robert F. McMurran, City of Portsmouth, presiding.

A motion was made to set aside the verdict on December 5, 1967, and on that date complaining witness, Herbert Farrar, appeared in Court and gave a statement to the Court concerning his previous testimony. Such statement was reviewed by the Court and after due deliberation, defendant's motion for a new trial was overruled.

The defendant, a bondsman and business man (tavern owner), and Herbert Farrar, called by the defendant, "Jake", had known each other for two years. For sometime they had an arrangement whereby Mr. Farrar, a negro man, would solicit bail prospects for the defendant (T-223). On one occasion the defendant gave Mr. Farrar $355.00 with which to purchase narcotics for him. The defendant admits giving Mr. Farrar the money, but testifies that it was a loan for Mr. Farrar's confectionery. However, at no time did the defendant present evidence of such a business transaction (T-201, 225 & 226). He did, however, further admit that Mr. Farrar came to him and asked him for money to buy narcotics (T-205, 206, 227 & 228).

Mr. Farrar did not purchase the narcotics, although he kept the money. The defendant continued to pressure Mr. Farrar for the money without success (T-13, 14, 140). On September 17, 1967, defendant went to Mr. Farrar's home and asked for Mr. Farrar, telling the brother of Mr. Farrar that no one is going to hurt Jake (T-137). When Jake's brother asked to come along, defendant refused to allow it and took Mr. Farrar away alone (T-137). They

went to the defendant's place of business, George Washington Tavern. It was a Sunday and no one was in the building besides the two men. They drank some whiskey (T-16) there and after some discussion concerning the payment of the money, the defendant stated that his promise to have the money was not good enough, that the defendant would have to call some people back. Defendant told Mr. Farrar that he would ". . . have to do better than that." (T-18). The defendant then made the call that he had threatened to make, and about ten minutes later two people came to the front door of the tavern wearing masks. Mr. Farrar said to the defendant, "These people got masks on. Don't open the door." Defendant then stated, "I told you, man, you weren't playing with little leaguers. You are playing with big leaguers." Then he unlocked the door (T-19). When he did so, the two masked men pushed past the defendant and started cursing Mr. Farrar and hit him in the face with a pistol, knocking his teeth out. Then they dragged him to the back room where he was brutally beaten. He was kicked and hit and beaten on the arms with cue sticks (T-20 & 21). After the beating, Mr. Farrar asked the defendant to take him to the hospital. Defendant replied, "Well, I got — no," he said. "Why? Wonder why they beat you up like that Jake? Well, you should think about it." (T-24). Defendant refused to take him to the hospital, but did later take him home, pushing him from the car (T-26 & 126) and drove off at a high rate of speed (T-139).

Although the defendant testifies that Mr. Farrar refused to be taken to the hospital or to the police station, Mr. Farrar went immediately to the hospital upon being returned home, and he made the report to the police that night (T-26).

About two weeks prior to the trial, defendant offered Mr. Farrar $1500.00 to "forget it." Mr. Farrar refused to take any money. A person with the defendant made a veiled threat to Mr. Farrar (T-33). And later threatened Mr. Farrar's family unless he retracted his statement. Mr. Farrar would not agree to perjure himself, but with further insistence he agreed to leave town before the trial. (T-34 & 35). About three hours later, the defendant called Mr. Farrar and told him that he would need a statement (T-35). This was later changed by his lawyer, Mr. Breit, into a question and answer period in front of a privately hired court reporter. This was about 9:00 p. m. that night. No one else was present or notified with the exception of Mr. Cohen, one of Mr. Breit's law partners, and the defendant.

The defendant's attorney, Arthur Ermlich, called S. Earl Griffin, Assistant Attorney for the Commonwealth, and stated that Jake wanted to make a statement and that they should get Sgt. K. C. Allen, the investigating officer, to accompany defendant to *find* Jake (T-192) to take the statement in their presence. The Assistant Commonwealth's Attorney agreed and tried to cooperate. He contacted the police Sergeant (T-193 & 194) and made arrangements for the Sergeant to accompany Mr. Ermlich the next morning in the taking of the statement from Jake, but Mr. Ermlich never returned the call, as he agreed he would, and never informed the police or the Commonwealth's Attorney of Portsmouth or Norfolk of the fact that he met this witness for the Commonwealth that very night (T-262) at approximately 9:00 p. m. (T-270) in the presence of a court reporter of his choice and the various members of his law firm, as well as the defendant himself (T-279 & 280 & 283), who escorted Jake to Norfolk to the defendant's at-

torney's office (T-36). The defendant was either present in Mr. Breit's conference room during the questioning or in the adjoining waiting room (T-38 & 40). Mr. Farrar stated that Mr. Breit suggested answers for him to give to various questions and Mr. Farrar stated he complied with these requests because he was scared of the defendant (T-41 & 42).

After the trial and on the evening before argument was to be heard on a motion to set aside the verdict, Mr. Farrar, accompanied by the defendant, appeared at Police Headquarters and asked to make a statement. The Commonwealth's Attorney, Von L. Piersall, Jr., was called by the Police. When he arrived, the defendant and Mr. Farrar were together and Mr. Farrar said he wanted to make a statement. He was told by Mr. Piersall that the Court would be considering this matter the very next morning and that to avoid confusion, Mr. Farrar should appear in Court and take the stand and state in open court under oath what he had to say. He did appear and made the flat statement that he had talked to certain persons whose identity he would not reveal and he expressed an opinion that Mr. Forrest had nothing to do with it (the beating), but he refused to change any of his testimony previously given at the trial.

"I still, like I said that Mr. Forrest did let the people in the place. He said he didn't see the masks on the peoples' faces so I don't know, but when he let them in, I know the guy walked over and hit me, and after that, well you know, I didn't know who hit me." (After trial T-17 & 18).

ARGUMENT

Certiorari should not be granted in this case because

the trial court rightfully refused to grant the petitioner a continuance or a mistrial as was requested by the defendant's attorney, Calvin W. Breit. The defendant was never denied his right to counsel of his own choosing and very effective counsel at that. The defendant was not denied the right to call witnesses in his defense.

1. The defendant and his attorney created for themselves the situation which they find themselves in. They participated in the taking of a statement from a Commonwealth witness, knowing at the time that the witness was very material to the case of the Commonwealth against the defendant. They did this themselves personally, without informing anyone from the courts or the Commonwealth's Attorney's offices. They kept this statement and its contents to themselves at all times. They obviously intended to use it, either to impeach the Commonwealth's witness or to hold over his head to pressure him to testify contrary to previous testimony and accusations.

In spite of the obligation imposed on them as arms of the court to be fair and candid with the court and opposing counsel, the defendant's attorneys came to court armed with this secret statement to which they were witnesses, and then when it came out in the open, as they knew it would, in fact, as they obviously intended it would, (T-47) they asked for leave to withdraw as counsel and participate as witnesses. I suggest this is what they fully intended to do from the beginning with the intention of drawing out the case and frustrating the witnesses for the Commonwealth.

The court at no time deprived the defendant of his right to counsel or his right to call witnesses in his behalf. The court merely overruled the motion for a mistrial or for

a continuance and told Mr. Calvin Breit to proceed as counsel and also take the stand if he thought it was necessary to protect his client. The defense counsel did proceed as counsel, but chose to use as witnesses Mr. Robert Cohen, an attorney and partner in his firm who was present at the taking of the statement, and also one Edward Jaime, who took down and transcribed the statement.

Except as found in the decided cases, the matter (of whether or not to grant a mistrial) is left to the sound discretion of the presiding judge, acting under his oath of office, having due regard to the rights of the accused and the State. *"The power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes."* 53 *Am. Jur. Trial, Sec.* 971.

Although the discretion of the judge is subject to review, " *. . . the discharge of the jury will not be reviewed on appeal unless the discreation of the trial court has been abused.*" (emphasis ours) 53 *Am. Jur. Trial, Sec.* 972.

As to the contention by defendant that the trial judge should have allowed a continuance for the purpose of counsel's withdrawal from the case, again this lies within the trial court's discretion, *. . . and the propriety of a refusal of such a motion depends primarily upon whether the accused was denied substantial justice.*" (emphasis ours) 17 *Am. Jur. 2d Continuance, Sec.* 35.

One other ground for a continuance that the defendant asserts, through his retained counsel, is "surprise" I suggest there certainly was no surprise here, at least none which couldn't have reasonably been foreseen.

"A defendant in a criminal case, who through no fault of his own is taken by surprise by some development in the

case against him, which he could not reasonably have been expected to foresee, may be entitled to a continuance to meet the new situation." 17 *Am. Jur. 2d Continuance, Sec.* 42.

Here the defendant's attorneys were using a type of trial tactic and in general, a client is bound by the acts of his attorney within the scope of the attorney's authority. 7 *Am. Jur. 2d Attys at Law, Sec.* 100.

Unquestionably, the defendant, Mr. Farrar, sought the advice of his attorney pursuant to the statement to be made by Mr. Farrar. Thus, he is bound by their actions, and if there is surprise resulting therefrom, then this must be surprise to the attorneys. It would certainly follow that these experienced criminal attorneys could have foreseen the possibility of Mr. Farrar's later going back on his statement, and the necessity for their possible testimony in the trial of the case. They knew that the defendant had allegedly had Mr. Farrar beaten up and that he was thereby afraid of the defendant.

The fact that Mr. Ermlich, co-counsel for the defendant, contacted the Commonwealth's Attorney's Office in relation to having Mr. Farrar give a statement in front of a police officer does not aid the defendant in his contention, but rather shows that counsel expected Mr. Farrar to possibly change his position. This is further evidenced by the obtaining of a court reporter for this statement, instead of the more usual sworn signed statement. Further, neither Mr. Breit nor Mr. Ermlich, (attorneys for Mr. Forrest) deemed it necessary to call either the Commonwealth's Attorney or anyone in either the Portsmouth or Norfolk police departments at the time the statement was obtained

from Mr. Farrar. Therefore, it is the Commonwealth's contention that such a turn of events as occurred in the courtroom could have reasonably been foreseen by defendant's counsel. Counsel could have easily remedied any problem in reference to their possible testimony in court by having the statement taken before the Commonwealth's Attorney or the police department. The defendant is bound by their decision not to do so.

Let us turn to the cases cited by counsel for the defense to determine whether or not in the case at bar the defendant has shown that he was prejudiced and denied substantial justice in the trial of his case because of the refusal of the presiding judge to grant either a mistrial or a continuance in order to effect substitution of counsel.

The case most strongly cited for the defendant is *Fish* v. *Com.* 208 *Va.,* 761. In the Fish case, counsel for the defendant was surprised by testimony of a witness for the Commonwealth on a material matter. The witness stated in the trial of the case of malicious wounding that the defendant had told her that his intentions when he shot at the victims of this shooting was ". . . to kill." Counsel for the defendant remembered no such statement of intent in the preliminary hearing and warned the witness that she would be contradicted at a later time. Later, in chambers after a motion to strike the Commonwealth's evidence was denied, counsel told the court that he had intended to use the police officers that were present at the preliminary hearing in order to show that the witness made no such statement at that time. However, counsel had later ascertained that the witnesses were sequestered at the preliminary hearing and that the officers did not hear the testimony of this witness. Counsel then moved the court for permission to

temporarily withdraw from the case in order to testify to what the witness had said at the preliminary hearing for impeachment purposes. The trial judge granted this request with the permission of the defendant, but after counsel took the stand for this purpose, the court determined that it would be improper for counsel to take further part in the case and argue the same. The court further suggested that another member of the firm could present the argument or the defendant could argue the case in his own behalf if he wished to do so.

In the Fish case, Mr. Lindauer was the sole counsel for the defendant during the trial of his case. Mr. Leon, a member of Mr. Lindauer's firm, was called and was given a brief summation of the case by Mr. Lindauer. Mr. Leon made a motion for a mistrial on the grounds that he had not earlier participated in the case and that he was unprepared to make the closing argument. The motion was overruled by the court and the subsequent verdict against Fish was reversed by this court. This was for the reason that the defendant was temporarily deprived of counsel during his trial, and that he was ineffectively represented by substitute counsel due to his having had such short notice before his participation in the case.

It is not the defendant's contention that he was without representation at any stage of his trial. He merely contends that because his counsel was accused of misconduct by the complaining witness that he was thereafter denied effective representation of counsel. This conclusion is ill-founded. The defendants cites several cases in his contention, none of which are on point. The case most heavily relied upon by the defendant is a Federal case, *Dovey* v. *Grandsinger,* 253 *F.* 2*d* 917 (8*th Cir.* 1958). The issue that

was decided in the Dovey case was ". . . whether, in a capital case trial in a State court, *a conviction and death sentence can, in view of the due process clause of the Fourteenth Amendment, be sustained notwithstanding an occurrence, such as that which took place in the Grandsinger trial,* resulting in the deprivation of the effectiveness and usefulness of the defendant's counsel." (emphasis ours). *Id. at page* 922. This habeas corpus case was based on an earlier trial in which the defendant, Grandsinger, was tried for the murder of Marvin Hansen, an officer of the State Safety Patrol. One of the chief issues in the case was whether guns found in the possession of the defendant could have inflicted the fatal wound. Prior to the appearance of the jury on the last day of trial and after the exhibits had been brought into the courtroom, the defendant's counsel was seen by the County Attorney with a dowel enlarging a hole in the belt earlier worn by Hansen. This fact was presented to the jury before argument and counsel for the defendant admitted in open court that it was the truth. Defendant had no earlier knowledge of his counsel's misconduct. Grandsinger was granted a new trial on his petition for habeas corpus based on the fact that counsel's admitted misconduct prejudiced the defendant in the trial of his case.

The case before the court is entirely different. The alleged misconduct of Mr. Breit was nothing more than an accusation. Mr. Breit introduced evidence to prove that no misconduct had occurred. A law partner, Mr. Cohen, and a qualified court reporter, Mr. Jaime, said that they were present that night, in a position to see both Mr. Breit and the complaining witness and that at no time did Mr. Breit hold up a pad for the witness to read or in any way tell him what answer to give. (T-266 & 280).

The motion by defendant for a mistrial or continuance was overruled by the presiding judge. This was done after counsel had argued the point and the issue was duly deliberated by the court. Such decision is not the subject of review on appeal unless the trial court has abused its discretion. 53 *Am. Jur. Trial, Sec.* 972.

The Honorable Robert F. McMurran realized that counsel had been put in an embarrassing position by this accusation. But he further realized that it was nothing more than an accusation and one which defendant could have expected. The Court suggested several alternative courses of action open to Mr. Breit under the circumstances. The Court told Mr. Breit that he might take the stand as a witness since defendant was further represented in the trial by co-counsel, Mr. Ermlich. The Court stated that this would not preclude Mr. Breit from taking further part in the case and that he could argue the case if he wished. It was further suggested by the Court that Mr. Ermlich could argue the case if Mr. Breit felt this was necessary. (T-46 & 51). Although Mr. Breit stated that Mr. Ermlich was unprepared for the case, it was evident that Mr. Ermlich had been seated at the counsel's table throughout the case, that he had been involved in the case before it came to trial (T-152) and that he had a part in questioning at least eight of the ten witnesses for the defendant, as well as numerous character witnesses.

The fact that Mr. Breit chose not to take the stand is not material to this assignment of error. He was given that opportunity not only by an able presiding judge, but also by the Canons of Professional Ethics, Canon 19 (in part), 205 *Va.* 1012.

"Except when essential to the ends of Justice, a lawyer should avoid testifying in Court in behalf of his client." (emphasis ours).

Certainly it would be unwise to loosen the flood gates by granting a new trial in any case where a lawyer's conduct is called into question in the trial of a defendant's case. This ground of appeal, as well as any ground of appeal, should only be resorted to in the most serious cases, where there can be no question of such counsel's misconduct and where it can be shown that such misconduct prejudiced the defendant. Such was not shown, nor could it be successfully argued in the facts of this case. As was earlier stated, the matter of whether or not a mistrial should be granted is left to the sound discretion of the presiding judge, acting under his oath of office, ". . . *having due regard to the rights of the accused and the state.*" (emphasis ours).

In Wash. v. *State of Texas,* 388 *U. S.* 14, 87 *S. Ct.* 1920, 1923, cited by the defendant on page 9 of his brief, the court was obviously dealing with an entirely different factual situation from the case at bar. The Commonwealth does not now nor did it at trial argue that the defendant shouldn't be allowed to call witnesses in his behalf. We offered no argument that Mr. Breit be refused permission to testify and he was not refused such permission.

CONCLUSION

In conclusion, the Commonwealth submits that the defendant's appeal is not well taken and that defendant was tried by a jury duly assembled and impaneled; and that the jury found him guilty based on evidence properly placed

before them and on proper instruction of the law applicable to the facts, without prejudice to the defendant in any way. There were no surprises from the Commonwealth's evidence and there was nothing which was withheld from the defendant. The Attorney for the Commonwealth, therefore prays that the Petition for a Writ of Certiorari be denied.

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